RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2)

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–363 OF 2001
ABDUL MALIK ISHAK J
16 NOVEMBER 2003

Civil Procedure — Stay of execution of judgment — Application for — Pending appeal — Whether appeal would be rendered nugatory

On 3 May 2002, the learned SAR allowed the plaintiff's application to enter summary judgment against the defendant. On 7 May 2002, a notice of appeal was filed to the judge in chambers by the defendant and that appeal was fixed for hearing on 6 November 2003. In the interim period, the plaintiff's solicitors filed a bankruptcy notice dated 30 November 2002 at the Kuching High Court in Sarawak on the strength of that judgment. The defendant applied for a stay of execution of the judgment dated 3 May 2002 entered against him by the learned SAR. The learned SAR heard the stay of execution of the judgment on 27 June 2003 and dismissed it. Aggrieved by that decision, the defendant filed a notice of appeal in relation to the refusal of the stay to the judge in chambers. The defendant argued that the appeal would, if successful, be rendered nugatory and this was said to be the core reason for the stay of execution to be granted. They also argued that the subject matter of the action would cease to exist and that the appeal would be rendered academic.

Held, dismissing the appeal:

(1) The defendant has failed to show that the defendant's appeal would be rendered nugatory if a stay was not granted. The emphasis of the nugatory test for determining the stay is not that the appeal would be successful. Rather, a stay is to be granted only if it can be shown that the appeal would be rendered nugatory if it would deprive the defendant of the result of the appeal (see paras 5, 6); *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126 followed.

(2) Any bankruptcy order which the plaintiff may obtain against the defendant could not and would not deprive the defendant of the result of his appeal. In the event that the defendant is adjudicated a bankrupt, he may still proceed with his appeal with the sanction of the Official Assignee. And in the event the defendant succeeds in his appeal, the bankruptcy order can be rescinded and annulled under s 105 of the Bankruptcy Act 1967 (see para 6).

(3) If the defendant is adjudicated a bankrupt, the subject matter of the action would not cease to exist nor would the defendant's appeal become academic. On the contrary, the defendant's appeal would still be relevant in order to determine as to whether the defendant was liable to pay the plaintiff and this will have a direct consequence on the issue of whether the defendant should have been adjudged a bankrupt under s 105 of the Bankruptcy Act 1967 (see para 7).

[**Bahasa Malaysia summary**

Pada 3 Mei 2002, Penolong Kanan Pendaftar ('PKP') yang bijaksana telah membenarkan permohonan plaintif untuk memasuki penghakiman terus terhadap defendan. Pada 7 Mei 2002, satu notis rayuan telah difailkan kepada hakim dalam kamar oleh defendan dan rayuan tersebut telah ditetapkan untuk perbicaraan pada 6 November 2003. Dalam tempoh interim, peguambela plaintif telah memfailkan satu notis kebankrapan bertarikh 30 November 2002 di Mahkamah Tinggi Kuching di Sarawak berdasarkan penghakiman tersebut. Defendan telah memohon satu penggantungan pelaksanaan penghakiman tersebut bertarikh 3 Mei 2002 yang dimasuki terhadap beliau oleh PKP yang bijaksana tersebut. PKP yang bijaksana telah mendengar penggantungan pelaksanaan penghakiman tersebut pada 27 Jun 2003 dan telah menolaknya. Terkilan dengan keputusan tersebut, defendan telah memfailkan satu notis rayuan berkaitan penolakan penggantungan tersebut kepada hakim dalam kamar. Defendan berhujah bahawa rayuan tersebut akan, jika berjaya, dianggap tidak berguna dan ini dikatakan sebab utama penggantungan pelaksanaan tersebut patut dibenarkan. Mereka juga berhujah bahawa perkara pokok tindakan tersebut tidak akan wujud lagi dan rayuan tersebut akan dianggap akademik.

Diputuskan, menolak rayuan tersebut:

(1) Defendan telah gagal untuk menunjukkan bahawa rayuan defendan akan dianggap tidak berguna jika penggantungan tidak dibenarkan. Penekanan ujian ketidakbergunaan untuk menentukan penggantungan tersebut bukan di mana rayuan akan berjaya. Tetapi, satu penggantungan akan dibenarkan hanya jika boleh ditunjukkan bahawa rayuan tersebut akan dianggap tidak berguna jika defendan terkilan akan keputusan rayuan tersebut (lihat perenggan-perenggan 5, 6); *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126 diikuti.

(2) Suatu perintah kebankrapan yang mungkin boleh diperolehi oleh plaintif terhadap defendan tidak boleh dan defendan tidak akan terkilan dengan keputusan rayuan beliau. Sekiranya defendan telah dihukum seorang itu bankrap, beliau masih boleh meneruskan rayuan beliau dengan sanksi Pegawai Pemegang Harta. Dan sekiranya defendan berjaya dalam rayuannya, perintah kebankrapan tersebut boleh dibatal dan dimansuhkan di bawah s 105 Akta Kebankrapan 1967 (lihat perenggan 6).

(3) Sekiranya defendan dihukum bankrap, perkara pokok tindakan tersebut tidak akan wujud dan rayuan defendan akan menjadi akademik. Sebaliknya, rayuan defendan masih relevan bagi tujuan menentukan sama ada defendan bertanggungjawab untuk membayar plaintif dan ini akan menghasilkan akibat langsung berhubung persoalan sama ada defendan patut dihukum bankrap di bawah s 105 Akta Kebankrapan 1967 (lihat perenggan 7).]

Notes

For cases on applications for stay of execution of judgments, see 2(2) *Mallal's Digest* (4th Ed 2001 Reissue) paras 5460–5481.

For stay of execution of judgment, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.1-048]-[10.13-054].

Cases referred to

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1989] 3 MLJ 40 (refd)
Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2) [1998] 2 MLJ 661 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Re; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (refd)
Mohamed Mustafa v Kandasami (No 2) [1979] 2 MLJ 126 (folld)
Perwira Habib Bank Malaysia Bhd v Sunny Travel & Tour Sdn Bhd & Ors 2(2) *Mallal's Digest* (4th Ed) para 4254 (refd)
RHB Bank Bhd v FGG Wood Mouldings Industries Sdn Bhd & Ors [2001] 4 MLJ 86 (refd)
'Yih Shen, The'; Lai Lai Yin v MV 'Yih Shen', Owners Of And Other Persons Interested [1986] 2 MLJ 65 (refd)

Legislation referred to

Bankruptcy Act 1967 s 105

Yoong Sin Min (Tharmy Ramalingam with her) (Shook Lin & Bok) for the plaintiff.
Dato' Muhammad Shafee Abdullah (Jeffrey John with him) (Shafee & Co) for the defendant.

Abdul Malik Ishak J:

Introduction

[1] Enclosure 19 was the defendant's application to stay the execution of the judgment entered against the defendant by the learned senior assistant registrar on 3 May 2002 pending the disposal of the defendant's appeal to the judge in chambers. The learned senior assistant registrar ('SAR') heard encl 19 on 27 June 2003 and she dismissed the defendant's application for a stay. Aggrieved by that decision, the defendant filed a notice of appeal in relation to the refusal of the stay to the judge in chambers as seen in encl 25.

[2] This was in the nature of a second judgment written by me arising from the same case and involving the same parties. This judgment revolved on the stay of execution pending the appeal to the judge in chambers.

The relevant events

[3] For convenience, I shall narrate them in this way:

(1) On 3 May 2002, the learned SAR allowed the plaintiff's application in encl 3 to enter summary judgment against the defendant with costs.

(2) On 7 May 2002, a notice of appeal was filed to the judge in chambers by the defendant and that appeal was fixed for hearing on 6 November 2003.

(3) In the interim period, the plaintiff's solicitors filed a bankruptcy notice dated 30 November 2002 at the Kuching High Court in Sarawak on the strength of that judgment and served the bankruptcy notice on the defendant on 17 February 2002.

(4) Now, that bankruptcy notice expressly stated that unless execution of the amount due has not been stayed, the defendant is to pay the plaintiff the amount due in the sum of RM5,132,966.51.

(5) In the circumstances, the defendant herein made an oral application for an interim stay of the execution of the order of the learned SAR dated 3 May 2002 and I allowed that oral application until the disposal of encll 14 and 25 on 6 November 2003.

To the heart of the matter

[4] Both parties have submitted at great length to convince me in regard to encl 25. There are two approaches on the question of a stay. I shall deal with them in quick succession.

The nugatory approach

[5] The defendant argued that the appeal would, if successful, be rendered nugatory and this was said to be the core reason for the stay of execution to be granted. But I was of the view that the defendant has failed to comply with the most essential of this test. It was this: that the defendant has failed to show that the defendant's appeal would be rendered nugatory if a stay was not granted.

[6] The emphasis of the nugatory test for determining the stay is not that the appeal would be successful. Rather, a stay is to be granted only if it can be shown that the appeal would be rendered nugatory if it would deprive the defendant of the result of the appeal (*Mohamed Mustafa v Kandasami (No2)* [1979] 2 MLJ 126). Here, what the defendant seeks to do is to stay the bankruptcy proceedings initiated by the plaintiff. To me, any bankruptcy order which the plaintiff may obtain against the defendant could not and would not deprive the defendant of the result of his appeal. In the event that the defendant is adjudicated a bankrupt, he may still proceed with his appeal with the sanction of the Official Assignee. And in the event the defendant succeeds in his appeal, the bankruptcy order can be rescinded and annulled under s 105 of the Bankruptcy Act 1967 (Act 360). In *RHB Bank Bhd v FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 4 MLJ 86, the court was of the view that the prospect of being made a bankrupt would not entitle the defendant to obtain a stay simply because the bankruptcy order, if made, was not irreversible. Again in the case of *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49, the Court of Appeal was of the same mind when it held that (see p 71 of the report):

> The winding up petition is still pending. The applicant still has every opportunity to contest it.
>
> Whatever it is, those factors are not 'special circumstances' (if we want to use the term) nor do they show that the appeal, if successful, will be rendered nugatory

(if we prefer that term). They are nothing unusual. Execution is a natural process after obtaining a judgment and winding up is one of them.

[7] Two major reasons were advanced by the defendant in an attempt to show that the appeal would be rendered nugatory if the stay was not granted. The first reason was that the subject matter of the action would cease to exist. The second reason was that the appeal would be rendered academic. But, with respect, these two reasons were insufficient. Allow me to elaborate. If the defendant is adjudicated a bankrupt, the subject matter of the action — which was the defendant's liability to pay the plaintiff, would not cease to exist and the defendant's appeal would not become academic. On the contrary, the defendant's appeal would still be relevant in order to determine as to whether the defendant was liable to pay the plaintiff and this will have a direct consequence on the issue of whether the defendant should have been adjudged a bankrupt under s 105 of the Bankruptcy Act 1967. The rigours of the decision of the Court of Appeal in *Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2)* [1998] 2 MLJ 661 can easily be watered down, factually speaking. There the severity that was required to exist before a stay was granted, on the basis that the appeal would be rendered nugatory, must be viewed in the context of the order for vacant possession that was stayed. At p 672 of the report, Abu Mansor JCA writing a separate judgment remarked:

> Mr Sivarasa for the applicants convinced us that no doubt that applicants' claim is for compensation, nonetheless if we were not to stay the respondent's vacant possession order before the hearing of the applicants' leave to appeal, it is clear the applicants' right to be there would be dissipated and gone before the appellants can have their several claims assessed and determined and their equity would largely have been eroded and destroyed. We were unanimous that to that extent the applicants' appeal would be nugatory. How can it not be so when what is left would be empty fields? We, therefore, allow the applicants' application for a stay of the Court of Appeal order for vacant possession of 20 January 1998 until the disposal of the applicants' application for leave to appeal in the Federal Court with cost of this application in the appeal.

[8] Going on an uphill task, the reliance by the defendant on the merits of his appeal makes not a whit of a difference. In an application for a stay of execution, the court is not concerned about the merits of the appeal proper (*Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131; *The 'Yih Shen'; Lai Lai Yin v MV 'Yih Shen', Owners Of And Other Persons Interested* [1986] 2 MLJ 65; *Perwira Habib Bank Malaysia Bhd v Sunny Travel & Tour Sdn Bhd & Ors*, 2(2) Mallal's Digest (4th Ed), para 4254; and *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 3 MLJ 40).

The special circumstances approach

[9] The defendant claimed that the refusal of a stay of execution would:

(1) cause severe loss to his reputation as a businessman;

(2) cause severe financial loss;

(3) create a grave risk that his assets would be disposed of;

(4) ruin him entirely; and

(5) create a risk of an irreparable harm.

[10] All these considerations are irrelevant and will not be considered by this court. They are not special circumstances. In my judgment, all the defendant has to do in order to avoid incurring those impediments and hardships would be to pay the judgment sum forthwith (*Ming Ann*). Such payment should be made without prejudice to the defendant's right to proceed with his appeal. Such payment too could be made to the solicitors of either the plaintiff or the defendant pending the disposal of the defendant's appeal. At any rate, the defendant has failed to show that the plaintiff would not be in a position to reimburse the defendant in the event the defendant succeeds in his appeal.

Conclusion

[11] For all these reasons, I must dismiss encl 25 with costs. I did just that.

Appeal dismissed.

Reported by Sally Kee Seok Meng